



## **Fair Up Or Down Vote**

**May 23, 2005**

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### **Statement of Sen. Orrin G. Hatch on Judicial Nominations, May 23, 2005**

Over the last several days, we have debated some of the most important issues that most members of this body will ever face.

Should the same powerful tools, such as the filibuster, that we have long used in the legislative process be part of the confirmation process to defeat a President’s judicial nominees?

Can the Senate’s role of advice and consent regarding judicial nominations be exercised equally by either the majority or minority of Senators?

The answer to each of these questions is no.

America’s founders designed the Senate without the ability to filibuster anything at all. The filibuster became available later, but was restricted to the legislative process which we control. It was not part of the appointment process, which the President controls.

Allowing a minority of Senators to capture this body's role of advice and consent will allow that minority to hijack the President's power to appoint judges.

Doing so distorts the balance the Constitution establishes.

That situation should not stand.

I urge Senators in the minority to abandon their destructive course and return to the tradition we followed for more than two centuries. The Senate, acting through a majority, checks the President's power to appoint by voting on whether to consent to those appointments.

Any Senator may vote against any nominee for any reason, but we must vote. We followed that tradition for more than 200 years, and we should re-commit ourselves to it now.

If the minority insists on distorting the Constitution's balance and rejecting Senate tradition, then I believe the Senate must firmly re-establish that tradition by exercising our constitutional authority to determine our own rules and procedures. If the minority will not exercise the same self-restraint this body exercised for the last two centuries, then I believe the Senate must vote to return formally to our tradition.

It is surely not a sign of our political culture's health that we may have to enforce by majority vote what we once honored by principle and self-restraint. But the Constitution's balance is too important to allow a minority to erode our principles and past practices.

Mr. President, the problem and the solution here each have their own frame of reference drawn from the Constitution. The frame of reference for evaluating these judicial filibusters is the separation of powers into three branches. The frame of reference for the solution to this judicial filibuster crisis is the Constitution's grant of authority for us, the United States Senate, to determine how we want to conduct Senate business.

Let me first address the judicial filibuster crisis through the lens, the frame of reference, of the separation of powers.

In the Federalist No.47, James Madison wrote of the separation of powers that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty."

Two points are particularly important here.

First, the separation of powers is exclusive. The powers assigned to one branch are denied to the others. Like our federal charter, each state constitution also divides the legislative, executive, and judicial powers into separate branches. More than two-thirds of them, however, go even further and make the exclusive nature of separation explicit.

They affirmatively prohibit each branch from exercising the powers assigned to the others. The separation of powers is that important.

While each branch may not exercise the powers given to the others, we can check the powers given to the others. A check on another branch's power is a safeguard. It is not a separate, co-equal power. It is neither separate from, nor as significant as, the power being checked. Nomination and appointment of judges is described in Article II, which outlines the President's powers. Not a word is found in Article I, which describes our powers.

The second point about the separation of powers is equally important. Just as the powers belong to the branches, checks and balances are exercised by the branches. The President, to whom the Constitution gives executive power, can check Congress' legislative power through the veto. He cannot delegate it to someone else in the executive branch.

Similarly, the Constitution assigns the role of advice and consent to the Senate. The question raised by the current filibuster campaign, however, is this: what is the Senate, the minority or the majority?

I do not want to get too technical here, but these are really basic civics principles that apply to legislative bodies everywhere. We must have what we call a quorum, a minimum number of Senators, present to be open for business. Senate Rule 6 defines a quorum as a "majority of Senators duly chosen and sworn." Today, that means 51 Senators. Unless the Constitution that created this body says otherwise, when a majority of those Senators acts, it is the Senate itself that acts.

This is no different than the Supreme Court. When a majority of its members votes the same way, we say it is the Court which has decided the case.

Mr. President, only the Senate itself can exercise its constitutional role of advice and consent on the President's judicial nominations. That is, only a majority of Senators can exercise that role. I make this point so strongly here because the minority is now claiming the right to exercise this body's role of advice and consent.

Last Thursday, the Senator from Massachusetts, Senator Kerry, here on the Senate floor charged that "the Republican leadership is determined to deny the minority the right to hold the executive responsible for lifetime appointments to the judiciary."

He was not the first to make this argument. We have heard for a long time now, from many Senators who support these filibusters, that the Senate rejects a nomination not when the majority has voted it down, but when the minority has prevented a final confirmation vote.

Mr. President, the minority does not check the President's power, the Senate itself does. And that means a majority of Senators checks the President's power. When the minority

has prevented a confirmation vote, the minority has prevented the Senate from exercising its role of advice and consent altogether.

I do not speak here primarily of the majority or minority party. I speak here of the numerical majority that is required in order for the Senate to act at all.

The vast majority of judicial nominations are confirmed either by unanimous consent, or by overwhelming margins on roll call votes. The number of truly controversial, hotly contested judicial nominations is small.

Still, at least 18 members of this body have voted against a judicial nomination of their own party. If the case against some of these nominees is so strong, and we have heard a great hue and cry about how some of them are out of some sort of mainstream, then Senators may do so again.

But the prospect of being on the losing side of a small number of confirmation votes does not, I repeat, does not justify turning these fundamental principles of the separation of powers inside out.

It does not justify the minority high jacking the Senate's role of advice and consent so it can hijack the President's power to appoint judges.

Yet that is indeed what these filibusters are doing. Defeating a vote to end debate can serve the laudable temporary purpose of ensuring full and vigorous debate. That full, vigorous debate can help the Senate make a more informed confirmation decision.

But these recent, unprecedented, leader-led filibusters defeat all votes to end debate for the ignoble permanent purpose of preventing confirmation of these nominations altogether. Doing so turns the separation of powers on its head.

Mr. President, the frame of reference, the organizing principle, for evaluating these judicial filibusters is the separation of powers. I think the case is compelling that the judicial filibuster campaign underway today – by which the minority tries to commandeer the Senate's role of advice and consent so they can wrongly attempt to trump the President's constitutional authority to appoint judges – violates that principle and cannot be allowed to continue.

If the minority will not relent, will not return to the tradition by which the Senate, through a majority, exercises its role of advice and consent, then I believe the majority must act to restore that tradition.

The frame of reference for solving this judicial filibuster crisis is the Senate's constitutional authority to determine our own rules and procedures.

Just as the Constitution establishes a system of self-government for the nation, it establishes a system of self-government for the Senate. Subject always to the

Constitution itself, we choose for ourselves how we want to do business. It may not always be nice, neat, and orderly, but it is up to us to decide.

One of the clichés that judicial filibuster proponents dreamed up is the cry that any solution to this judicial filibuster crisis would require breaking the rules to change the rules. Presumably that catchy little phrase refers to the fact that invoking cloture on an amendment to the text of our written rules requires not just 60 votes, but two-thirds of Senators present and voting.

This argument is, I suppose, intended to make people think that our written rules are the only guide for how the Senate operates. Most of our fellow citizens may not know one way or another. No one can fault them for not being schooled in the particularities of Senate procedure.

But my fellow Senators certainly know the answer. Every Senator in this body knows that the Standing Rules of the Senate are only one of several things that guide how we do business.

The solution to the judicial filibuster crisis which the Majority Leader, Dr. Frist, will pursue will neither break the rules nor change the rules. The Standing Rules of the Senate will read the same next week as they did last week.

Instead, the solution will utilize a parliamentary ruling by the presiding officer, something that is at least as important as our written rules for the way we conduct our day to day business.

When a Senator asks a question of procedure, or raises a point of order, the presiding officer's answer to that question, or his ruling on that point of order, becomes a precedent of the Senate.

These parliamentary precedents guide what we do as much as our written rules.

Let me stress something very important at this point, Mr. President. The Constitution gives the role of advice and consent to a majority, not to a minority. Similarly, the Constitution gives authority to decide how the Senate does business to the Senate, not to the presiding officer.

There are no monarchs or dictators in America, or in the United States Senate. Should the presiding officer rule that the Senate may proceed to vote on judicial nominations after sufficient debate, that will become a parliamentary precedent guiding this body only after a majority Senators vote to make it so.

As I have discussed here in the Senate before, this mechanism might better be called the Byrd option because, when he was Majority Leader, the distinguished Senator from West Virginia, Senator Byrd, repeatedly used it to change how the Senate does business.

The Senator from West Virginia knows that I have the greatest respect for him. I heard him on the Senate floor again this afternoon. But, as I will describe in the next few minutes, I believe my friend from West Virginia doth protest too much.

In 1977, for example, then-Majority Leader Byrd used this mechanism to eliminate what was called the post-cloture filibuster. If the Senate voted to invoke cloture on a bill, Rule 22 imposed a one-hour debate limit on each Senator. Senators could get around that limit, however, by introducing and debating amendments. Rule 22 allowed this practice, but the Majority Leader opposed it. He made a point of order against it, the presiding officer ruled in his favor, and a simple majority of Senators voted to back up the ruling.

Nearly two decades later, the Senator from West Virginia reflected on how he had used the Byrd option in 1977. He described it this way:

“I have seen filibusters. I have helped to break them. There are few Senators in this body who were here [in 1977] when I broke the filibuster on the natural gas bill....I asked Mr. Mondale, the Vice President, to go please sit in the chair; I wanted to make some points of order and create some new precedents that would break these filibusters.

And the filibuster was broken – back, neck, legs, and arms....So I know something about filibusters. I helped to set a great many of the precedents that are in the books here.”

He changed Senate procedures without changing Senate rules.

The Senator from West Virginia did it again in 1979. Rule 16 explicitly states that the Senate itself must decide whether amendments to appropriations bills are germane. Then-Majority Leader Byrd made a point of order that the presiding officer may decide that question instead. The presiding officer ruled in his favor, and a majority of Senators voted to affirm the ruling. Once again, a parliamentary ruling changed Senate procedures without changing Senate rules.

It happened again in 1980.

As we have discussed, Rule 22 requires 60 votes to invoke cloture, or end debate, on any matter pending before the Senate. This includes bills or nominations, but it also includes motions to proceed to those bills or nominations.

Then-Majority Leader Byrd wanted the Senate to confirm an individual nomination. He made a single motion to go into executive session to consider a nomination, a step that is not debatable, and to proceed to an individual nomination, a step that was debatable.

This time, the point of order came from a Republican Senator, arguing that this procedural two-step was improper. The presiding officer agreed, ruling against what Majority Leader Byrd was trying to do. He still prevailed, however, when a majority of Senators voted to overturn the presiding officer’s ruling. Doing so eliminated the filibuster on a motion to proceed to a specific nomination.

Mr. President, seven Democratic Senators serving in this body today voted to eliminate these nomination-related filibusters. They proved not only that the Byrd option is legitimate, but also that it can be used to limit debate. I leave it to these Senators to explain how they could vote to eliminate nomination-related filibusters in 1980 but support nomination filibusters today.

This 1980 example is particularly relevant because it utilized a parliamentary ruling to eliminate a nomination-related filibuster – not a filibuster of the nomination itself, but a filibuster on the motion to proceed to the nomination. That is, of course, a distinction without a difference. Either one keeps a nomination from final approval.

Mr. President, still other examples exist, but I will not go into more detail here.

Suffice it to say that using parliamentary rulings to change Senate procedures without changing Senate rules is a well-established method for the Senate to govern itself.

Should the Majority Leader, Senator Frist, utilize it, he will be on solid ground. He will simply be relying upon the precedents that his predecessor, Senator Byrd, helped put on the books.

If the Majority Leader does utilize the Byrd option, no one will be able to suggest, let alone charge, that he is doing so precipitously. He has been patient, methodical, and even cautious when it comes to the important matter. Far from the image of trigger-happy warriors being used in some interest group ads out there, the Majority Leader will utilize the Byrd option only after trying every conceivable alternative first.

The minority has had every opportunity to do what it says it wants to do, namely, debate these nominations.

The nominees being filibustered, for example, include Texas Supreme Court Justice Priscilla Owen, nominated 1474 days ago to a judicial position that has been vacant for more than eight years. More than eight years.

Justice Owen received a unanimously well qualified rating from the American Bar Association, which our Democratic colleagues once said is the gold standard for evaluating judicial nominees.

Let me repeat that. She was rated unanimously well qualified by the ABA. And some are calling her out of the mainstream.

Give me a break.

Justice Owen was at the top of her law school class. She had the highest score on the Texas Bar Exam in 1977. She is supported by 15 past presidents of the Texas Bar

Association, both Democrats and Republicans, and was endorsed for re-election by virtually every major newspaper in the state.

Out of the mainstream? I think she defines the mainstream.

I mention Justice Owen as an example, though her opponents use the same tactics against nominee after nominee. They claim that Justice Owen is what they call an extremist, or outside of the mainstream, most often by tallying up the winners and losers in her judicial decisions. They say she rules too often on this side in criminal cases, too often on that side in civil cases, not enough for this or that political interest.

Whether or not Justice Owen is controversial, whether or not anyone considers her inside or outside of some kind of mainstream, these may be reasons to vote against her confirmation, not to refuse to vote at all.

The Judiciary Committee has more than once approved her nomination and she deserves a vote here in the Senate.

Rather than give her that fair vote, those fearing they would lose that vote are blocking it with a filibuster.

On April 8, 2003, my colleague from Utah, Senator Bennett, asked then-Assistant Minority Leader Reid how much time the Democrats would require to debate the nomination fully. He responded: "there is not a number [of hours] in the universe that would be sufficient." They did not want to debate Justice Owen, they wanted to defeat her. Debate was not a means to the end of exercising advice and consent, it was an end in itself to prevent exercising advice and consent.

The Majority Leader has made offer after offer of more and more time, hoping that the tradition of full debate followed by an up or down vote would prevail. That hope is fading as Democrats object to every single offer, no matter how much time it included. Finally, last month, the Minority Leader admitted that "this has never been about the length of the debate."

Unanimous consent is the most common way we structure how we consider bills and nominations. Because the Democrats rejected that course, Majority Leader Frist was forced to turn in March 2003 from seeking unanimous consent to the more formal procedure of motions to invoke cloture. During the 108th Congress, we took 20 cloture votes on 10 different appeals court nominations. More than 50, but fewer than 60, Senators supported every one of those motions.

That was enough to confirm, but not enough to end debate.

The circle was complete, and the minority's strategy of using the filibuster to prevent confirmation of majority supported judicial nominations was in full swing.

Still the Majority Leader held off, resisting the growing calls to implement a deliberate solution to this unprecedented, unfair, and frankly outrageous filibuster blockade.

The election returns provided more evidence that the American people opposed using the filibuster to prevent fair up or down votes on judicial nominations.

But hope that the voice of those we serve would change how we serve them was soon shattered.

When the current 109th Congress began, the minority made it clear they would continue their filibuster campaign.

Mr. President, the minority can say that this is a narrow effort focused only on a few appeals court nominees. It is not.

This is about the entire judicial confirmation process.

It is about rigging that process so the minority can do what only the majority may legitimately do in our system of government, determine how the Senate exercises its role of advice and consent.

It is the Constitution, not the party line or interest group pressure, not focus groups or ad campaigns, that should guide us here. I have been told, for example – and I hope it is not true – that my friend from Nevada, the Minority Leader, may appear in a television ad created and paid for by the Alliance for Justice, one of the most left-wing groups involved in this obstruction campaign. I think that is regrettable.

The Constitution assigns the nomination and appointment of judges to the President, not to the Senate. The Senate checks that power by deciding whether to consent to appointment of the President's nominees. We exercise this role by voting on confirmation.

As such, filibusters designed to prevent confirmation of majority supported judicial nominations undermine the separation of powers.

The Constitution helps us both evaluate the problem and highlight the solution. The Constitution gives the Senate authority to determine how we will do our business. That includes not only our written rules, but also parliamentary precedents that change procedures without changing those rules.

Our Democratic colleagues have had literally dozens of opportunities to return to our confirmation tradition of up or down votes for judicial nominations reaching the Senate floor.

They have chosen the path of confrontation rather than cooperation.

They exercised the true nuclear option by blowing up two centuries of tradition. If the Majority Leader utilizes the Byrd option, it will truly be as a last resort, and it will be a constitutional means of solving an unconstitutional problem.

**Prepared Floor Statement of Sen. Chuck Grassley, of Iowa**  
**“Up or Down Vote”**  
**Monday, May 23, 2005**

Thank you, Mr. President. For several days now, the Senate has been debating two nominees to the federal bench, Priscilla Owen and Janice Rogers Brown. I've come to the floor to express my support for these highly qualified women, and to urge my colleagues to support an up or down vote to confirm them.

One of the most important roles we Senators have is the responsibility of advising and consenting to individuals that the President has nominated to fill the federal bench. But this responsibility has been threatened by the actions of the Democrat Leadership. That has brought us to this debate today.

The Constitution is very clear on the role of the Senate in the judicial confirmation process. Judicial nominees are chosen by the President with the advice and consent of the Senate. Until President Bush was elected, no one ever interpreted this requirement to mean anything other than a simple majority vote. For over 200 years, no judicial nomination with clear majority support in the Senate had ever been denied an up or down vote on the Senate floor. This was the case, regardless of whether a Republican or Democrat President was in office. This was the case, regardless of whether the Senate was controlled by Republicans or Democrats.

But, in the 108th Congress, the Democrat Leadership decided it was going to change the ground rules. The Senate Democrats rejected this 200 year old Senate tradition of giving judicial nominees up or down votes. By doing this, they have rejected the Constitution, the traditions of the Senate, and the will of the American people.

The Democrat leadership targeted 16 of President Bush's 52 court of appeals nominees. They filibustered 10 and threatened filibusters against 6 more - a full 31% of President Bush's appellate court nominees. Because of this, President Bush has had the lowest percentage of his court nominees confirmed by any President in recent memory.

What's this debate all about? It's basically a debate about what the Constitution requires us to do, and it's a debate about fairness. These judicial nominees have been waiting for years to be confirmed - they have majority support here in the Senate.

But a minority of Senators is so opposed to President Bush's appellate court nominees, that it won't allow the Senate to give them an up or down vote. The Democrat leadership won't allow the Senate to exercise its constitutional duty of advice and consent. The Democrat leadership won't allow me to exercise my constitutional

responsibility. They're denying me that responsibility. That's not right. The Constitution demands an up or down vote. Fairness demands an up or down vote.

Some have claimed that a rule change on this matter is a violation of Senators' free speech or minority rights. But it isn't. There isn't anything out the ordinary about the Majority wanting to exercise its right to alter Senate procedures by setting new precedent. For example, in 1977, 1979, 1980 and 1987, Senator Byrd led a Democrat Senate majority in setting precedents to restrict minority rights.

The Republicans, who were the minority party, did not respond by shutting down the Senate or stalling legislation.

On the other hand, the actions of the Senate Democrats is unprecedented obstruction, plain and simple. The Democrat leadership isn't interested in additional debate on the nominees. This isn't about the Minority wanting to exercise speech and debate on the nominations. The Republican Majority Leader has offered Democrats as much time as they want for debate. Yet the Democrat Leader indicated in so many words that the Democrats wouldn't agree to any time agreement. The Democrat leadership has taken the position that it won't ever allow an up or down vote on these nominees. The Minority Leader has indicated that there's no time long enough for the Democrats to debate these nominations.

I clearly understand the importance of filibusters and wouldn't want to see them done away with completely. However, it's also important to make a distinction between filibustering legislation and filibustering judicial nominations.

The interests of the Minority party are protected in the United States Senate. Filibusters are allowed to ensure that the Minority has a voice in crafting legislation. When working on a bill, it's possible to make changes and compromises to legislative language until you reach the 60 votes needed under the Senate rules to bring debate to a close. Unlimited debate ensures that compromise can take place.

Judicial nominees are very different from legislation. A person cannot be "redrafted" or compromised on as bills can. You can't cut off a left arm of a judicial nominee and put on a new left arm.

For judicial nominations, it's the Senate's responsibility to determine whether the nominees are qualified for the positions they're nominated to, and to vote them up or down. Throughout our nation's history, it's only taken a majority of Senators to determine a nominee's qualification. That's a history worth continuing.

So the reality about the Democrat Leadership's filibuster is that the Minority wants to block filling appellate court judgeships by requiring 60 votes to proceed to the nominations. But no other President has been required to get 60 votes for his judicial nominees. No other judicial nominees needed to pass the 60 vote hurdle, a supermajority

vote. Many federal judges on the bench today would have never made it, not with that requirement.

In fact, all these Senators here got elected by a simple majority - 50% of the vote. If we had that supermajority rule for Senators, I can assure you that a lot of my colleagues wouldn't be here today. Why are Senators now wanting to approve judges only if they can get 60% of the vote?

The reality is that no other Senate majority has been excluded from the judicial confirmation process in over 200 years. We need to restore tradition and the law to the judicial process - we need to give these nominees an up or down vote. We need to stop this systematic denial of our advice and consent responsibility by use of the filibuster.

I've been a member of the Senate since 1981. Before I got here, I was in the House of Representatives since the early 70's. I love this body, and have worked very hard to be a productive Senator.

I want to do what is best for the Senate, for my constituents, for my country. That's what I was elected to do. I believe that the Republican Majority Leader also is trying to do what he thinks is the best thing for our country, by moving to reestablish over 200 years of Senate tradition of giving judicial nominees up or down votes. This won't destroy the Senate, it'll restore the Senate to its traditions and to the Constitution. I think it's just plain hogwash to say that moving to make sure the rule is to give judicial nominations up or down votes will hurt our ability to reestablish fairness in the judicial nominations process. It won't hurt Minority rights. It'll reestablish regular order. It'll be fair for both Republicans and Democrats alike.

All Majority Leader Frist wants is a chance to vote these nominees up or down. If these individuals don't have 51 votes, they'll be rejected. That'll be it. But if these individuals do have 51 votes, then the Constitution says that they'll be confirmed.

If a Senator disapproves of the individual, then vote against the nominee. But don't deprive the people of the right to support a nominee through their elected representative.

Some claim that many judicial nominees were filibustered by Republicans, particularly when President Clinton was in office. Well, that isn't accurate, to say it nicely.

Very few people, either inside or outside this chamber, have been as involved with the issue of judicial nominations and the use of the filibuster as I have. As a long time Chairman of the Judiciary Subcommittee that oversaw the federal courts, I have a unique perspective on the debate before us.

First, when the Democrats were in the Majority in the Senate, they blocked 30 of President Reagan's nominees and 58 of President Bush, Sr.'s nominees in the Judiciary

Committee. Then, in the last few years of President Clinton's Administration, many Republicans became disillusioned with a number of the nominees that Administration had sent to the Senate. We felt that our own Republican leadership was allowing out of the mainstream nominees to be confirmed.

This all came to a head with the nominations of now Ninth Circuit judges Paez and Berzon. At that time, we had a Democrat President and a Republican controlled Senate. There was serious talk of filibustering these nominees. I've heard some Democrats and ill-informed pundits try to make the case that Paez and Berzon were filibustered.

Well, guess what? Those nominations were not filibustered.

The reality is that the Republican leadership, including the Chairman of the Judiciary Committee at the time, argued that there had never been a filibuster of an appellate court nominee. The Republican leadership argued Republicans shouldn't cross that Rubicon and set the precedent because then it'd be used against us in the future with a Republican Administration. So, it was decided there wouldn't be a filibuster and we wouldn't set that precedent. There would be a cloture vote, but everyone knew the cloture vote would prevail and the nominees would be confirmed with a majority vote.

So, the members who wanted to filibuster decided to go along with the leadership's wise counsel, even though these members never really trusted that the Democrat leadership would follow our example. I voted for cloture, but then voted against the nominees. I wasn't alone. Other Republican Senators did the same thing. But in the end, unfortunately, those members were right not to trust the Democrat leadership, because the Democrat leadership has now crossed the Filibuster Rubicon.

But we aren't only being denied the ability to perform our constitutional duty in the judicial selection process. This move to filibuster is upsetting the checks and balances and separation of powers principles our nation is founded on. The Democrats are the ones who are upsetting the checks and balances - they want to grind the judicial process to a halt for appellate court nominees so that they can fill the bench with individuals that have been rubberstamped by the left wing extreme groups.

Let me say something about the nominees that we have before us. Priscilla Owen and Janice Rogers Brown are both highly qualified individuals, with exceptional legal abilities. They are talented women, respected women. They are true pioneers. But, they've been drawn into the web of the far left wing special interest groups.

These women have been called outside the mainstream and unworthy of the federal bench. They've been labeled, among other things, as "activist", anti-civil rights, and anti-consumer. These claims are just not true. And the claims charged against other Bush judicial nominees are just as false. All these outrageous claims have consequences.

The travesty is that Priscilla Owen and Janice Rogers Brown have been waiting for years to be confirmed. The travesty is that worthy nominees, like Miguel Estrada, withdrew their nominations. The travesty is that a nominee, like Charles Pickering, is trashed. The travesty is the good name of a nominee, like William Pryor, is dragged through the mud.

Ripping to shreds the reputations of these individuals with unfounded allegations is unacceptable. This tactic just sends a clear message to good people who want to serve our country that they'll have to endure outlandish and baseless attacks on their records and character.

The Democrats are doing this because they're using a far-left litmus test to satisfy their left wing, out of the mainstream, special interest groups. So when the Democrat Leadership says that these nominees are outside of the mainstream, they're basically saying that these individuals haven't been approved by their allies, the far left special interest groups.

But judicial nominees shouldn't be subject to any litmus test. They shouldn't be subject to an ideology litmus test. A nominee should not be opposed, as Priscilla Owen and Janice Rogers Brown are being opposed right now, because they will strictly follow the law, rather than legislate the left wing's agenda from the bench.

Moreover, history has proven the wisdom of having the President place judges with the support of the majority - not supermajority - of the Senate. That process ensures balance on the courts between judges placed on the bench by Republican Presidents and those placed on the bench by Democrat Presidents.

The current obstruction led by Senate Democratic leaders threatens that balance. Priscilla Owen and Janice Rogers Brown deserve an up or down vote. It's high time to make sure all judges receive a fair up or down vote on the Senate floor. Up or down votes for the judicial nominees of both Republican and Democrat Presidents alike.

In my town meetings across Iowa, I hear from people all the time - why aren't the judges being confirmed? I think most people understand that the process is being politicized to the point that good men and women are being demonized and their records distorted to an unprecedented level. I hear from Iowans all the time that they want to see these nominees treated in a fair manner, and they want to see an up or down vote. The Democrat leadership likes to say that the Republicans are the ones that are changing the rules. But that just isn't true.

The Democrats are the ones that have engaged in extreme behavior and tactics, pulling out all the stops to defeat well qualified nominees who would have majority support of the Senate if they were given an up or down vote. They are the ones who have distorted the rules to the point that the Senate is being denied the ability to fulfill its constitutional duty.

Filibustering judicial nominees may be touted as standing firm on principle. On the contrary, what it boils down to is an obstruction of justice. Let's do the American people a favor. Let's stop the theatrics and get back to the people's business. All of the rallies and political spin-doctoring aren't clearing any court dockets. And they aren't impressing the American public either.

Let's debate the nominees and give our advice and consent. It's a simple yea or nay. Filibustering a nominee into oblivion is misguided warfare and the wrong way for the minority party to leverage influence in this body. Threatening to grind legislative activity to a standstill if they don't get their way is like the bully on the playground. Let's do our jobs.

Nothing is "nuclear" about asking the full Senate to take an up or down vote on judicial nominees. This is how the Senate has operated for over 200 years. The reality here is the Democrats are the ones who are turning Senate tradition on its head by installing the filibuster against the President's judicial nominees.

The Senate has a choice. We can live up to our constitutional duties to advise and consent President Bush's judicial nominations, or we can surrender our constitutional duties to the left wing special interest groups who apparently control the Democratic party. This Senator will choose to follow the Constitution.

We need a return to a respectable and fair process. We need a return to the law and the Constitution. We need a return to the Senate's longstanding tradition. We need an up or down vote for these judicial nominees.

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### **It's time for votes on judicial nominees**

**By JIM DEMINT**

**The State**

**May 22, 2005**

In January, I placed one hand on the Bible and raised the other, pledging to uphold the Constitution of the United States. Only four months later, I am disappointed to find that partisan games of an obstructionist group prevent me from fulfilling that oath.

Last week, senators on both sides of the aisle debated two judicial nominees — Priscilla Owen and Janice Rogers Brown. It's time to vote, and if Democrats continue to abuse the filibuster, I will vote to restore Senate precedent, ensuring a majority vote on all future nominees.

It is interesting to observe what the Constitution requires of the U.S. Senate and what it does not. Nowhere does it say Congress must pass new laws, but it does require the

president to nominate judges and specifies that Senators “advise and consent” on those nominees.

How can I advise and consent without the ability to cast a vote? Forty-one senators are preventing a bipartisan majority from carrying out the duty we were elected to fulfill. In 2003, Democrats used the filibuster to block up-or-down votes on 10 nominations — all had bipartisan, majority support. This was unprecedented.

While hiding behind the rhetorical guise of protecting the Senate tradition of filibuster, Democrats chose to throw 200 years of tradition out the window. Never before had a judicial nominee with clear majority support been denied confirmation due to a filibuster. In fact, both the late Sen. Strom Thurmond and former Sen. Fritz Hollings had a history of voting against judicial filibusters even when they opposed the nominee.

One of my goals is to ensure timely up-or-down votes for all nominees, no matter who is president, no matter which party is in the majority. Republicans have repeatedly offered the open hand of compromise, with hundreds of hours of debate, to resolve this standoff. We have sought one thing — a simple up-or-down vote at the end of that debate. Democrats, as they have done on nearly every important issue, have refused to negotiate.

As Democratic obstruction has made the Senate a graveyard of good ideas, it has now become a graveyard of good nominees, such as Janice Rogers Brown.

Justice Brown, nominated to the D.C. Circuit Court in 2003, has been filibustered based on unsubstantiated claims that she is “out of the mainstream.” Were three-quarters of California voters out of the mainstream when they elected her as the first African-American to their state supreme court? Was the American Bar Association out of the mainstream when it unanimously gave her its highest endorsement?

The obstructionists should go to the Senate floor, make their arguments, allow senators to draw their conclusions on her nomination and then let us vote. If their arguments are so strong, they should be able to convince a majority to agree. Otherwise, they are simply smearing the integrity of a highly respected jurist to score political points against the president, at the expense of vandalizing the Constitution.

We need to end the undemocratic blockade of judicial nominees, which is why I have urged Senate Majority Leader Bill Frist to consider the constitutional option. Senators were elected to advise and consent, not to grandstand and obstruct.

Let’s be clear: Not a single Republican senator wants to end the legislative filibuster. That would destroy the Senate’s longstanding respect for senators’ rights to amend and debate legislation. The Senate majority wants to end the judicial filibuster and restore the Senate tradition of giving the president’s nominees a vote.

There is a reason Americans elected George W. Bush and a large Republican majority in Congress. The majority of Americans trusted our judgment on judicial nominees. There is

also a reason Democrats are in the minority. Most Americans did not trust them to make these decisions.

This is not a trivial matter. This issue was at the forefront of every Senate campaign in the last two elections. In 2002, voters returned Republicans to the majority in the Senate. Then in 2004, after two years of unprecedented denials of simple votes on judicial nominees, Americans elected Republicans to an even larger majority.

Forty-one senators are now ignoring the will of the American people, thinking partisan politics matters more than elections and constitutional duties.

The Constitution allows Democrats to pass the judicial nominees they want without filibusters: Every four years we hold presidential elections. In the meantime, Democrats must accept the judgment of the American people.

It is time for Republicans to lead, as Americans have elected us to do. We ran on a platform of ideas to secure America's future, and voters agreed. We ran on giving the president's nominees a fair up-or-down vote, and voters agreed.

The Senate Republican majority must stand up for the Americans who elected us. We must have courage to uphold the Constitution, restore Senate tradition and end the partisan obstruction.

## **CONGRESSIONAL HISPANIC CONFERENCE**

*Congresswoman Ileana Ros-Lehtinen, Chair*

**- For Immediate Release -**

**May 23, 2005**

**Contact: Mario H. Lopez (202) 225-2778**

### **Congressional Hispanic Conference Members Respond to Sen. Reid**

**WASHINGTON, D.C.** - The Congressional Hispanic Conference released the following statements today from two of its members regarding Senator Reid's press conference today and his refusal to allow judicial nominees a fair, up or down vote:

"Every judicial nominee who reaches the floor should receive a fair, up or down vote. I implore Democratic Senators to put partisanship aside and stop the judicial obstruction"

**Resident Commissioner Luis G. Fortuño (PR), Vice-Chair**

"Senate Democrats seem intent on preventing highly qualified women and minorities from serving on our nation's high courts. According to Senate Democrat memos, they targeted Miguel Estrada because 'he is Latino.' Sadly, Democrats have shown that they do not care about the advancement of Hispanics, but rather only with the advancement of Democrats who happen to be Hispanic.

"Senate Democrats prefer playing partisan politics rather than doing their job and voting. By their radical actions, Senate Democrats are eroding the Senate's decorum. Highly qualified and highly respected judicial nominees who are approved through committee deserve an up-or-down vote."

**Rep. Mario Diaz-Balart (FL-25)**

## **MEDIA ADVISORY**

### **Senator Specter to Discuss Judicial Nominations with Prominent Members of the Legal Community**

**EVENT:** Senator Arlen Specter (R-PA), Chairman of the Senate Judiciary Committee, will hold a press conference with prominent members of the legal community to discuss judicial nominations and the need for up or down votes on the Senate floor.

**PARTICIPANTS:** **Senator Arlen Specter**, Chairman, Senate Judiciary Committee  
**Hon. Dan Lungren**, U.S. Congressman (CA-3) and former California Attorney General  
**Judith Hope**, Senior Counsel at Paul, Hastings, Janofsky & Walker law firm and member of Harvard University's senior governing body  
**Viet Dinh**, Professor of Law at Georgetown University and former Assistant Attorney General of the Office of Legal Policy at the Department of Justice  
**Brian Jones**, former General Counsel, Department of Education, and former colleague of Justice Janice Rogers Brown  
**Juan Carlos Benitez**, Hispanic National Bar Association and former Justice Department official  
**Roger Pilon**, Vice President for Legal Affairs and Director, Center for Constitutional Studies, CATO Institute

**DATE/TIME:** TOMORROW - TUESDAY, May 24, 2005 @ 9:00 a.m.

**LOCATION:** Capitol, LBJ Room (Room S211)  
Washington, D.C.

Please note cameras must be pre-set by 8:45 a.m. as the press conference will begin immediately at 9 a.m.

**Contact:** Elizabeth Keys, SRC, (202) 224-2928  
Blain Rethmeier, Judiciary, (202) 224-9020

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